

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

UNITED STATES MARITIME  
ADMINISTRATION, PETE BUTTIGIEG, in  
his official capacity, and LUCINDA  
LESSLEY, in her official capacity,

Defendants.

Civil Action No.: 4:21-cv-132-EWH-LRL

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

On December 23, 2022, President Biden signed the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 ("NDAA") into law. Pub. L. No. 117-263. The NDAA contains provisions impacting the Maritime Administration ("MARAD")'s America's Marine Highway Program, two of which are particularly pertinent here. These provisions of the NDAA are attached to this document as **Exhibit A** and are discussed below.

First, the NDAA changes the name of MARAD's program from the America's Marine Highway Program to the U.S. Marine Highway Program. *Id.* § 55601(a)(1).

Second, the NDAA prohibits marine highway project designations. *Id.* § 55601(d)(2)(C). Prior to the NDAA, once a marine highway route was designated by the Secretary of Transportation ("Secretary"), applicants could request that the Secretary designate a marine highway project. Defendants' Opening Brief, ECF No. 32 at 4. A "marine highway project" was a new or expanded service that provides support for a specific marine highway route. *Id.*; see 46 C.F.R. 393.1(f). For example, the James River Container Expansion Project supports the M-64

marine highway route in Virginia. Only after a marine highway project was designated could an applicant submit a grant proposal to apply for future funding that could become available to implement the designated project. Defendants' Opening Brief, ECF No. 32 at 4.

Now that the NDAA has been enacted, the Secretary will no longer designate marine highway projects. As was the case pre-NDAA, the Secretary can designate marine highway routes. But once the route is designated, applicants may submit grant proposals to apply for future funding for projects related to that marine highway route; they no longer need to request that the Secretary designate a marine highway project prior to submitting grant proposals.

As stated in Defendants' memorandum in support of its motion for leave to file this notice of supplemental authority (ECF No. 48), the NDAA is not retroactive and therefore does not impact MARAD's prior implementation of the Program or the merits of Plaintiff's claim that MARAD had not initiated and completed consultation pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), on the Program as a whole or on previously issued individual grants. However, because of the NDAA, some of the statements contained in Defendants' briefs regarding the name of the Program and how the Program operates will not be accurate in the future.<sup>1</sup>

*[Signature page follows.]*

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<sup>1</sup> The Department of Transportation and MARAD are considering if the regulations relating to the Program need to be updated to account for the changes to the Program made in the NDAA. If the regulations are amended, Defendants may file another notice of supplemental authority.

Dated: February 24, 2023

Respectfully submitted,

PETE BUTTIGIEG,  
Secretary of Transportation,

ANN C. PHILLIPS,  
Administrator of Maritime Administration,

MARITIME ADMINISTRATION,

JESSICA D. ABER,  
United States Attorney

/s/

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**EXHIBIT A**  
**Excerpts of National Defense Authorization Act**  
**for Fiscal Year 2023**

1 date that is one year after the date of the enactment  
2 of this Act.

3 (b) CONFORMING AMENDMENTS.—Title 46, United  
4 States Code, is further amended—

5 (1) in section 53106(a)(2), by inserting “or sec-  
6 tion 51307(b)” after “this section”;

7 (2) in section 53206(a)(2), by inserting “or sec-  
8 tion 51307(b)” after “this section”; and

9 (3) in section 53406(a), by inserting “or section  
10 51307(b)” after “this section”.

11 **Subtitle C—Maritime**  
12 **Infrastructure**

13 **SEC. 3521. UNITED STATES MARINE HIGHWAY PROGRAM.**

14 (a) UNITED STATES MARINE HIGHWAY PROGRAM.—

15 (1) IN GENERAL.—Section 55601 of title 46,  
16 United States Code, is amended to read as follows:

17 **“§ 55601. United States marine highway program**

18 **“(a) ESTABLISHMENT.—**

19 **“(1) IN GENERAL.—**There is in the Department  
20 of Transportation a program, to be known as the  
21 ‘United States marine highway program’.

22 **“(2) ADDITIONAL PROGRAM ACTIVITIES.—**In  
23 carrying out the program established under this sub-  
24 section, the Secretary of Transportation may—

1           “(A) coordinate with ports, State depart-  
2           ments of transportation, localities, other public  
3           agencies, and appropriate private sector entities  
4           on the development of landside facilities and in-  
5           frastructure to support marine highway trans-  
6           portation; and

7           “(B) develop performance measures for the  
8           program.

9           “(b)     MARINE     HIGHWAY     TRANSPORTATION  
10          ROUTES.—

11           “(1) DESIGNATION.—The Secretary may des-  
12          ignate a route as a marine highway transportation  
13          route, or modify such a designation, if—

14           “(A) such route—

15           “(i) provides a coordinated and capa-  
16           ble alternative to landside transportation;

17           “(ii) mitigates or relieves landside  
18           congestion;

19           “(iii) promotes marine highway trans-  
20           portation; or

21           “(iv) uses vessels documented under  
22           chapter 121; and

23           “(B) such designation or modification is  
24          requested by—

1 “(i) the government of a State or ter-  
2 ritory;

3 “(ii) a metropolitan planning organi-  
4 zation;

5 “(iii) a port authority;

6 “(iv) a non-Federal navigation dis-  
7 trict; or

8 “(v) a Tribal government.

9 “(2) DETERMINATION.—Not later than 180  
10 days after the date on which the Maritime Adminis-  
11 trator receives a request for the designation or modi-  
12 fication of a marine highway route under paragraph  
13 (1), the Maritime Administrator shall make a deter-  
14 mination of whether to make the requested designa-  
15 tion or modification.

16 “(3) NOTIFICATION.—Not later than 14 days  
17 after the date on which the Maritime Administrator  
18 makes a determination under paragraph (2), the  
19 Maritime Administrator shall notify the requester of  
20 the determination.

21 “(c) MAP OF MARINE HIGHWAY PROGRAM  
22 ROUTES.—

23 “(1) IN GENERAL.—The Maritime Adminis-  
24 trator shall make publicly available a map showing  
25 the location of marine highway routes, including

1 such routes along the coasts, in the inland water-  
2 ways, and at sea and update that map when a ma-  
3 rine highway route is designated or modified pursu-  
4 ant to subsection (b).

5 “(2) COORDINATION.—The Maritime Adminis-  
6 trator shall coordinate with the Administrator of the  
7 National Oceanic and Atmospheric Administration  
8 to incorporate the map referred to in paragraph (1)  
9 into the Marine Cadastre.

10 “(d) ASSISTANCE.—

11 “(1) IN GENERAL.—The Secretary may make  
12 grants to, or enter into contracts or cooperative  
13 agreements with, eligible entities to implement a ma-  
14 rine highway transportation project or a component  
15 of such a project if the Secretary determines that  
16 the project or component—

17 “(A) meets the criteria referred to in sub-  
18 section (b)(1)(A); and

19 “(B) develops, expands, or promotes—

20 “(i) marine highway transportation;

21 or

22 “(ii) shipper use of marine highway  
23 transportation.

24 “(2) APPLICATION.—



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1           “(A) IN GENERAL.—To be eligible to re-  
2           ceive a grant or to enter into a contract or co-  
3           operative agreement under this subsection, an  
4           eligible entity shall submit to the Secretary an  
5           application in such form and manner, and at  
6           such time, as the Secretary may require. Such  
7           an application shall include the following:

8                   “(i) A comprehensive description of—

9                           “(I) the marine highway route to  
10                          be served by the marine highway  
11                          transportation project;

12                          “(II) the supporters of the ma-  
13                          rine highway transportation project,  
14                          which may include business affili-  
15                          ations, private sector stakeholders,  
16                          State departments of transportation,  
17                          metropolitan planning organizations,  
18                          municipalities, or other governmental  
19                          entities (including Tribal govern-  
20                          ments), as applicable;

21                          “(III) the need for such project;  
22                          and

23                          “(IV) the performance measure  
24                          for the marine highway transportation  
25                          project, such as volumes of cargo or

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1 passengers moved, or contribution to  
2 environmental mitigation, safety, re-  
3 duced vehicle miles traveled, or re-  
4 duced maintenance and repair costs.

5 “(ii) A demonstration, to the satisfac-  
6 tion of the Secretary, that—

7 “(I) the marine highway trans-  
8 portation project is financially viable;  
9 and

10 “(II) the funds or other assist-  
11 ance provided under this subsection  
12 will be spent or used efficiently and  
13 effectively.

14 “(iii) Such other information as the  
15 Secretary may require.

16 “(B) PRE-PROPOSAL.—

17 “(i) IN GENERAL.—Prior to accepting  
18 a full application under subparagraph (A),  
19 the Secretary may require that an eligible  
20 entity first submit a pre-proposal that con-  
21 tains a brief description of the item re-  
22 ferred to in clauses (i) through (iii) of such  
23 subparagraph.

24 “(ii) FEEDBACK.—Not later than 30  
25 days after receiving a pre-proposal under

1 clause (i) from an eligible entity, the Sec-  
2 retary shall provide to the eligible entity  
3 feedback to encourage or discourage the el-  
4 igible entity from submitting a full applica-  
5 tion. An eligible entity may still submit a  
6 full application even if that eligible entity  
7 is not encouraged to do so after submitting  
8 a pre-proposal.

9 “(C) PROHIBITION.—The Secretary may  
10 not require separate applications for project  
11 designation and for assistance under this sec-  
12 tion.

13 “(D) GRANT APPLICATION FEEDBACK.—  
14 Following the award of assistance under this  
15 subsection for a particular fiscal year, the Sec-  
16 retary may provide feedback to an applicant to  
17 help such applicant improve future applications  
18 if the feedback is requested by that applicant.

19 “(3) TIMING.—

20 “(A) NOTICE OF FUNDING OPPOR-  
21 TUNITY.—The Secretary shall post a notice of  
22 funding opportunity regarding grants, con-  
23 tracts, or cooperative agreements under this  
24 subsection not more than 60 days after the date

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1 of the enactment of the appropriations Act for  
2 the fiscal year concerned.

3 “(B) AWARDING OF ASSISTANCE.— The  
4 Secretary shall award grants, contracts, or co-  
5 operative agreements under this subsection not  
6 later than 270 days after the date of the enact-  
7 ment of the appropriations Act for the fiscal  
8 year concerned.

9 “(4) NON-FEDERAL SHARE.—

10 “(A) IN GENERAL.—Except as provided in  
11 subparagraph (B), not more than 80 percent of  
12 the funding for any project for which funding  
13 is provided under this subsection may come  
14 from Federal sources.

15 “(B) TRIBAL GOVERNMENTS AND RURAL  
16 AREAS.—The Secretary may increase the Fed-  
17 eral share of funding for the project to an  
18 amount above 80 percent in the case of an  
19 award of assistance under this subsection—

20 “(i) to an eligible entity that is a  
21 Tribal government; or

22 “(ii) for a project located in a rural  
23 area.

24 “(5) PREFERENCE FOR FINANCIALLY VIABLE  
25 PROJECTS.— In awarding grants or entering into

1 contracts or cooperative agreements under this sub-  
2 section, the Secretary shall give a preference to a  
3 project or component of a project that presents the  
4 most financially viable transportation service and re-  
5 quire the lowest percentage of Federal share of the  
6 funding.

7 “(6) TREATMENT OF UNEXPENDED FUNDS.—  
8 Notwithstanding paragraph (3)(B), amounts award-  
9 ed under this subsection that are not expended by  
10 the recipient within five years after obligation of  
11 funds or that are returned shall remain available to  
12 the Secretary to make grants and enter into con-  
13 tracts and cooperative agreements under this sub-  
14 section.

15 “(7) CONDITIONS ON PROVISION OF ASSIST-  
16 ANCE.—The Secretary may not provide assistance to  
17 an eligible entity under this subsection unless the  
18 Secretary determines that—

19 “(A) sufficient funding is available to meet  
20 the non-Federal share requirement under para-  
21 graph (4);

22 “(B) the marine highway project for which  
23 such assistance is provided will be completed  
24 without unreasonable delay; and

1           “(C) the eligible entity has the authority to  
2           implement the proposed marine highway  
3           project.

4           “(8) PROHIBITED USES.—Assistance provided  
5           under this subsection may not be used—

6           “(A) to improve port or land-based infra-  
7           structure outside the United States; or

8           “(B) unless the Secretary determines that  
9           such activities are necessary to carry out the  
10          marine highway project for which such assist-  
11          ance is provided, to raise sunken vessels, con-  
12          struct buildings or other physical facilities, or  
13          acquire land.

14          “(9) GEOGRAPHIC DISTRIBUTION.—In making  
15          grants, contracts, and cooperative agreements under  
16          this section the Secretary shall take such measures  
17          so as to ensure an equitable geographic distribution  
18          of funds.

19          “(10) ELIGIBLE ENTITY.—In this subsection,  
20          the term ‘eligible entity’ means—

21               “(A) a State, a political subdivision of a  
22               State, or a local government;

23               “(B) a United States metropolitan plan-  
24               ning organization;

25               “(C) a United States port authority;

1 “(D) a Tribal government; or

2 “(E) a United States private sector oper-  
3 ator of marine highway projects or private sec-  
4 tor owners of facilities, including an Alaska Na-  
5 tive Corporation, with an endorsement letter  
6 from the requester of a marine highway route  
7 designation or modification referred to in sub-  
8 section (b)(1)(B).”.

9 (2) CLERICAL AMENDMENT.—The analysis for  
10 chapter 556 of title 46, United States Code, is  
11 amended by striking the item relating to section  
12 55601 and inserting the following:

“55601. United States marine highway program.”.

13 (b) MULTISTATE, STATE, TRIBAL, AND REGIONAL  
14 TRANSPORTATION PLANNING.—

15 (1) IN GENERAL.—Chapter 556 of title 46,  
16 United States Code, is amended by inserting after  
17 section 55602 the following:

18 “§ 55603. Multistate, State, Tribal, and regional trans-  
19 portation planning

20 “(a) IN GENERAL.—The Secretary, in consultation  
21 with Federal entities, State and local governments, Tribal  
22 governments, and appropriate private sector entities, may  
23 develop strategies to encourage the use of marine highway  
24 transportation for transportation of passengers and cargo.

1 “(b) STRATEGIES.—If the Secretary develops strate-  
2 gies under subsection (a), the Secretary may—

3 “(1) assess the extent to which States, local  
4 governments, and Tribal governments include ma-  
5 rine highway transportation and other marine trans-  
6 portation solutions in transportation planning;

7 “(2) encourage State and Tribal departments of  
8 transportation to develop strategies, where appro-  
9 priate, to incorporate marine highway transpor-  
10 tation, ferries, and other marine transportation solu-  
11 tions for regional and interstate transport of freight  
12 and passengers in transportation planning; and

13 “(3) encourage groups of States, Tribal govern-  
14 ments, and multistate transportation entities to de-  
15 termine how marine highways can address conges-  
16 tion, bottlenecks, and other interstate transportation  
17 challenges.”.

18 (2) CLERICAL AMENDMENT.—The analysis for  
19 chapter 556 of title 46, United States Code, is  
20 amended by striking the item relating to section  
21 55603 and inserting the following:

“55603. Multistate, State, Tribal, and regional transportation planning.”.

22 (c) RESEARCH ON MARINE HIGHWAY TRANSPOR-  
23 TATION.—Section 55604 of title 46, United States Code,  
24 is amended—



1 (1) by redesignating paragraphs (1) through  
2 (3) as paragraphs (3) through (5), respectively; and  
3 (2) by inserting before paragraph (3), as rededesignated  
4 by paragraph (1), the following new paragraphs:  
5

6 “(1) the economic effects of marine highway  
7 transportation on the United States economy;

8 “(2) the effects of marine highway transportation,  
9 including with respect to the provision of additional  
10 transportation options, on rural areas;”.

11 (d) DEFINITIONS.—

12 (1) IN GENERAL.—Section 55605 of title 46,  
13 United States Code, is amended to read as follows:

14 “

15 **“§ 55605. Definitions**

16 “In this chapter:

17 “(1) The term ‘marine highway transportation’  
18 means the carriage by a documented vessel of cargo  
19 (including such carriage of cargo and passengers), if  
20 such cargo—

21 “(A) is—

22 “(i) contained in intermodal cargo  
23 containers and loaded by crane on the vessel;  
24

1 “(ii) loaded on the vessel by means of  
2 wheeled technology, including roll-on roll-  
3 off cargo;

4 “(iii) shipped in discrete units or  
5 packages that are handled individually,  
6 palletized, or unitized for purposes of  
7 transportation;

8 “(iv) bulk, liquid, or loose cargo load-  
9 ed in tanks, holds, hoppers, or on deck; or

10 “(v) freight vehicles carried aboard  
11 commuter ferry boats; and

12 “(B) is—

13 “(i) loaded at a port in the United  
14 States and unloaded either at another port  
15 in the United States or at a port in Can-  
16 ada or Mexico; or

17 “(ii) loaded at a port in Canada or  
18 Mexico and unloaded at a port in the  
19 United States.

20 “(2) The term “Tribal government” means the  
21 recognized governing body of any Indian or Alaska  
22 Native Tribe, band, nation, pueblo, village, commu-  
23 nity, component band, or component reservation, in-  
24 dividually identified (including parenthetically) in  
25 the list published most recently, as of the date of en-

1 actment of the James M. Inhofe National Defense  
2 Authorization Act for Fiscal Year 2023, pursuant to  
3 section 104 of the Federally Recognized Indian  
4 Tribe List Act of 1994 (25 U.S.C. 5131).

5 “(3) The term ‘Alaska Native Corporation’ has  
6 the meaning given the term ‘Native Corporation’  
7 under section 3 of the Alaska Native Claims Settle-  
8 ment Act (43 U.S.C. 1602).”.

9 (2) CLERICAL AMENDMENT.—The analysis for  
10 chapter 556 of title 46, United States Code, is  
11 amended by striking the item relating to section  
12 55605 and inserting the following:

“55605. Definitions.”.

13 (e) REPORT ON MARITIME HIGHWAY TRANSPOR-  
14 TATION IN GULF OF MEXICO AND PUGET SOUND.—Not  
15 later than one year after the date of the enactment of this  
16 Act, the Maritime Administrator shall submit to the Com-  
17 mittee on Transportation and Infrastructure of the House  
18 of Representatives and the Committee on Commerce,  
19 Science and Transportation of the Senate a report on op-  
20 portunities for maritime highway transportation, as that  
21 term is defined section 55605(1) of title 46, United States  
22 Code, as amended by this section, in the Gulf of Mexico,  
23 Puget Sound, and Salish Sea System by vessels docu-  
24 mented under chapter 121 of title 46, United States Code.

1 (f) DEADLINE FOR PUBLIC AVAILABILITY OF MAP.—  
2 Not later than 120 days after the date of the enactment  
3 of this Act, the Maritime Administration shall make pub-  
4 licly available the map of marine highway program routes  
5 required to be made publicly available under subsection  
6 (c) of section 55601 of title 46, United States Code, as  
7 amended by this section.

8 **SEC. 3522. PORT INFRASTRUCTURE DEVELOPMENT**  
9 **GRANTS.**

10 (a) IN GENERAL.—In making port infrastructure de-  
11 velopment grants under section 54301 of title 46, United  
12 States Code, for fiscal year 2023, the Secretary of Trans-  
13 portation shall treat a project described in subsection (b)  
14 as an eligible project under section 54301(a)(3) of such  
15 title for purposes of making grants under section 54301(a)  
16 of such title.

17 (b) PROJECT DESCRIBED.—A project described in  
18 this subsection is a project to provide shore power at a  
19 port that services—

20 (1) passenger vessels described in section  
21 3507(k) of title 46, United States Code; and

22 (2) vessels that move goods or freight.